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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. [redacted] 125

DOUBLE EAGLE REFINING COMPANY, Frank A. Kerran and Cameron L. Kerran, Individuals and Co-Partners, Trading and Doing Business as DOUBLE EAGLE REFINING COMPANY,
Petitioners,

VERSUS

FEDERAL TRADE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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June, 1959.

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June 19, 1959

Honorable James R. Browning, Clerk
United States Supreme Court
Supreme Court Building
Washington, D. C.

Dear Sir:

The following corrections should be made in the Petition for Writ of Certiorari in the case of the Double Eagle Refining Company:

On Page 4, the fifth line from the top, the date should be changed from 1945 to 1955.

On Page 13, the third word in the heading should be changed from "arts" to "acts".

On Pages 3, 20 and 21, where the three words "adverse customer reaction" appear they should appear in italics instead of quotation marks.

In the appendix the opinion of the Federal Trade Commission should be the second opinion instead of the last.

Sincerely yours

JOSH LEE, for
Josh Lee and John Ogden

JL/jm s

cc: Mr. James E. Corkey
Assistant General Counsel
Federal Trade Commission

cc: Honorable J. Lee Rankin
Solicitor General of the United States
Department of Justice
Washington, D. C.

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SUBJECT INDEX

	PAGE
Grounds for Jurisdiction	2
Questions Presented for Review	2
Text of the Applicable Law	3
Statement of the Case	4
Reasons for Allowing the Writ: I.	8
No Bearing On Quality or Identity	10
No Deceptive Arts or Practices	13
No Question of Foreign Origin	17
A New Question of Federal Law	17
A Misleading Label	18
Adverse Customer Reaction	20
Reasons for Allowing the Writ: II.	22
A Theoretical Public Preference	22
Public Preference for Quality	26
Not Supported by the Evidence	29
Conclusion	35

AUTHORITIES CITED

CASES:

American Tack Co., Inc., et al. v. Federal Trade Commission, 211 F.2d 239	17
A. S. Buller and Company (Docket No. 4193)	11

INDEX CONTINUED PAGE

Consolidated Book Publishing Co. v. Federal Trade Commission, 53 F.2d 942, 944 13

Federal Cordage Company, Inc. (Docket No. 5959) 10

Federal Trade Commission v. Algoma Lumber Company, 291 U.S. 67, 54 Sup. Ct. 315, 317, 78 L.Ed. 655 19

Federal Trade Commission v. Raldam Company, 283 U. S. 587 33

Federal Trade Commission v. Royal Milling Co., 288 U.S. 212, 217 ..... 13, 14, 15

Haskelite Mfg. Corp. v. Federal Trade Commission, 127 F.2d 765 ..... 16, 34

Kock v. Federal Trade Commission, 206 F.2d 311 18

L. Heller & Son, Inc., et al. v. Federal Trade Commission, 191 F.2d 954 17

National Labor Relations Board v. Columbian Enameling & Stamping Co., Inc., 306 U.S. 392, 59 Sup. Ct. 501 32-33

Ohio Leather Co. v. Federal Trade Commission, 45 F.2d 39 28-29

STATUTES:

Federal Trade Commission Act, Sec. 5(a) 3, 21

Federal Trade Commission Act, Sec. 5(b) 4

Federal Trade Commission Act, Sec. 5(c) (38 Stat. 719, as amended, 15 U.S.C.A. 45) 5

APPENDIX

Appendix I:

Initial Decision, William L. Pack, Hearing Examiner, Federal Trade Commission, Docket No. 6432, In the Matter of Frank A. Kerran and Cameron L.

INDEX CONTINUED

PAGE

Kerran, Individuals and Co-partners, Trading and Doing Business as Double Eagle Refining Company (Filed April 22, 1959) i

Majority Opinion, Bratton, Chief Judge, United States Court of Appeals, Tenth Circuit, No. 5850, Double Eagle Refining Company, Petitioner v. Federal Trade Commission (Filed March 19, 1959) v

Minority Opinion, Breitenstein, Circuit Judge (Filed March 19, 1959) ix

Appendix II:

Opinion of Federal Trade Commission, Anderson Commissioner, Docket No. 6432 (Issued February 14, 1958) xiv

In the
Supreme Court of the United States
OCTOBER TERM, 1958

No. .....

DOUBLE EAGLE REFINING COMPANY, Frank A. Kerran and Cameron L. Kerran, Individuals and Co-Partners, Trading and Doing Business as DOUBLE EAGLE REFINING COMPANY,
Petitioners,

VERSUS

FEDERAL TRADE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Reference is made to the following opinions:

The Initial Decision of Hearing Examiner for the Federal Trade Commission filed April 22, 1957,

The opinion of the Federal Trade Commission issued February 14, 1958, and

The majority opinion and a minority opinion of the United States Court of Appeals for the Tenth Circuit filed March 19, 1959. (These documents appear in the appendix in chronological order.)

GROUNDS FOR JURISDICTION

The Final Decree of the United States Court of Appeals Affirming and Enforcing the Order to Cease and Desist was issued April 17, 1959.

1. The United States Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court.

2. The United States Court of Appeals has decided Federal questions in a way in conflict with applicable decisions of this Court.

No Petition for rehearing was filed.

No Petition for an extension of time was filed.

Jurisdiction is given to this Court by the statute. The last sentence in Section 5(c) of the Federal Trade Commission Act says:

> "The judgment and decree of the Court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in Section 240 of the Judicial Code."

QUESTIONS PRESENTED FOR REVIEW

I.

Is it a violation of the Federal Trade Commission Act to sell or offer for sale in interstate commerce lubricating oil which is manufactured from previously used oil without disclosing that fact in the labels, even though the nature of oil is such that it does not wear out or change molecular structure with usage and when re-refined loses

completely its identity as "used oil" and is therefore no longer "used oil" but "new oil" in every sense of the term, not a substitute, but the genuine product, IDENTICAL to that manufactured from the original raw material? Under these circumstances, is a customer who buys re-refined oil prejudiced even though he gets exactly what he chooses; namely, "new oil"? In other words, does the law require disclosure of a particular fact concerning the origin of a raw material which contributes no information about the quality or identity of the product itself but which would have the effect of deceiving and misleading the customer by giving him the erroneous impression that the product is a secondhand product and consequently inferior in quality? This raises a related question, is it a violation of the law not to disclose any fact concerning the origin of a raw material which, if disclosed in the label, repels customers? In short, is "adverse customer reaction" to the disclosure of a fact concerning the origin of a raw material, proof that nondisclosure of that fact constitutes a violation of the law?

TEXT OF THE APPLICABLE LAW

The first paragraph of Section 5(a) of the Federal Trade Commission Act reads as follows:

> "Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

STATEMENT OF THE CASE

The proceedings as to which review is sought, arose out of a complaint issued by the Federal Trade Commission pursuant to Section 5(b) of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C.A. 45) on the 27th day of October, 1945. The complaint alleged that petitioners were engaging in unfair methods and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. The allegedly unfair and deceptive acts and practices in commerce consisting of re-refining previously used lubricating oil, packaging it in metal cans of the same general size, kind and appearance as those used for packaging lubricating oil produced from virgin crude and selling it in commerce with no mark indicating that said product was made from previously used oil. It was alleged that the aforesaid acts and practices of petitioners' company, and the fact that it does not disclose that it is oil produced in whole or in part from previously used oil, has the tendency and capacity to mislead and deceive a substantial number of retailers and members of the purchasing public into the erroneous and mistaken belief that said oil is refined by petitioners from virgin crude and to induce the purchasing public to purchase substantial quantities of said product because of such erroneous and mistaken belief. It was alleged that as a result thereof substantial trade in commerce has been and is being unfairly diverted to petitioners' company from its competitors, and that substantial injury is being done to competitors in commerce.

In due course petitioners appeared and showed cause why an order to cease and desist should not be entered by the Commission. Hearings were held before a Hearing Examiner of the Commission in which testimony was taken and reduced to writing and exhibits were received in evidence. Upon such hearing the Commission's Hearing Examiner entered an Initial Decision in writing ordering petitioners to cease and desist.

Petitioners appealed from the Initial Decision. The Commission denied petitioners' appeal, modified the Initial Decision slightly, entered a final order and adopted the modified Initial Decision of the Examiner as the decision of the Commission.

Thereupon, petitioners appealed from the Final Decision and Order of the Commission petitioning the United States Court of Appeals to review and set aside the order.

The jurisdiction of that Court was evoked under Section 5(c) of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C.A. 45). Petitioners reside and carry on business within the Tenth Judicial Circuit in that petitioners do business as individuals and co-partners in business as Double Eagle Refining Company, located at 1900 Northeast First Street, Oklahoma City, Oklahoma; and their Post Office Box is 6213, Oklahoma City 1, Oklahoma. The acts and practices in question were performed within the Tenth Circuit.

The United States Court of Appeals for the Tenth Circuit heard oral argument November 17, 1958, and affirmed the decision of the Federal Trade Commission by a two to one majority decision, issuing majority and minor-

ity opinions March 19, 1959, and entered a Decree Affirming and Enforcing the Order of the Commission, April 13, 1959.

It was established by the evidence that there are two distinct methods of reclaiming previously used oil. One is merely to filter and settle the oil. The other is to actually refine it again. The filtering and settling method is inexpensive since it requires almost no equipment. It removes the visible contaminants with the result that the oil has the appearance of new oil, although it still contains invisible contaminants. The re-refining method, on the other hand, requires a substantial outlay of capital, since the oil must be subjected to all of the processes and treatments used in refining it originally. The result is that re-refined oil is completely free of all contaminants.

It was established by undisputed evidence that when previously used oil is actually re-refined, the finished product is "new oil" in every sense of the term, and that no chemist can distinguish re-refined oil from oil which has been made from virgin crude, and that re-refined oil is not a substitute for oil refined from virgin crude, but that it is *identical* in every respect.

It was also established by undisputed evidence that Double Eagle Refining Company is a bona fide refining company owning and operating a complete refinery with adequate equipment located on several acres of land on the outskirts of Oklahoma City, Oklahoma, and that Double Eagle Refining Company has not made one false, untrue or misleading statement in any of its advertising matter; and that its product is everything that it is claimed to be—

namely, "new oil", and that its product is exactly what it appears to be—namely, "new oil." It was established by undisputed evidence that Double Eagle's product is not an imitation of new oil, it is "new oil", and that it is not a substitute for oil made from virgin crude; but it is identical in every respect since it is precisely the same product.

The fact that the United States Air Force uses re-refined oil in its aircraft was offered in evidence but objected to. The Commission and the court were asked to take judicial notice of the following facts which have appeared from time to time in the public press since 1948.

In 1951, there were approximately 150 re-refiners operating in 74 cities of 33 states. Approximately 1,500,000 barrels were re-refined by these re-refiners that year, and approximately 12 million barrels of used oil were thrown away that same year.

The following organizations and companies are some of the best known heavy users of lubricating oil who use re-refined oil. They either re-refine it themselves or have it re-refined and use it over again and again: [1]

Defense Service
The United States Air Force

Industrial and Utility Companies
General Electric Company
Kaiser Electric Company
Cessna Aircraft Company

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[1] Listed and documented in a study prepared by the Association of Petroleum Re-refiners by M. Belmont Ver Standig, Inc., Washington, D. C.

Kansas Power and Light Company
Mississippi Valley Dehydrating Plant
Iowa Public Service Company
Wright Aeronautical Plant
Bell Aircraft Corporation
Hercules Power Company
Pennsylvania Electric Company
Buick Motor Division, General Motors
Dodge Chicago Plant, Chrysler Corporation
Studebaker Corporation, Aviation Division
North American Aviation, Inc., of Kansas City

Transportation Companies
American Airlines
Pan American Airways
Eastern Airways
Fifty-Seven Railroad Companies
Greyhound Bus Company
Diamond Cab Company of Long Beach, California
Public Service Transport of New Jersey

REASONS FOR ALLOWING THE WRIT

I.

The Writ should be allowed because the United States Court of Appeals for the Tenth Circuit has decided an important question of Federal law which has not been but should be settled by this Court.

The facts concerning the origin of any raw material are so numerous that it is not reasonable or practicable to disclose all of them in the label on the finished product. In applying a criteria for determining which of these many facts must be disclosed in order not to deceive the customer, the question arises as to whether a distinction should

be made between materials which wear out and those which do not.

The United States Court of Appeals in affirming the Commission's decision has refused to recognize such a distinction. Thus, this difference in the nature of materials which wear out and the nature of oil which does not wear out presents a new question of Federal law in determining which of the many facts concerning the origin of a raw material must be disclosed in order not to deceive the purchasing public. The court has refused to recognize that re-refined oil is not "used oil" but "new oil" even though this fact was established by scientific evidence and is not disputed. The Court has followed the Commission in refusing to recognize that Double Eagle's product is not a "substitute" for new oil but that it is a new oil. The court has followed the Commission in refusing to recognize that Double Eagle's oil is not merely a product of high quality which is "just as good as" oil made from virgin crude but that it is IDENTICAL to oil made from virgin crude, although it was established by the testimony of Mr. Cameron Kerran, a petroleum engineer, who testified not only from his knowledge and experience in the laboratory, but offered documented proof from recognized authorities that when waste oil is re-refined, it is then no longer "used oil" but "new oil" in every sense of the term, not merely "as good as" but actually "identical" to the oil produced from virgin crude. Thus, the court's refusal to recognize these undisputed scientific facts about oil has caused it to err in deciding this important new question of Federal law. In the following cases, the factor which distinguishes Double Eagle's product from other pro-

ducts is the quality of durability which the court has refused to recognize.

No Bearing On Quality or Identity

1. It is not disputed that nondisclosure of the facts concerning the origin of a raw material is a violation of the law if those facts have a bearing on the quality or identity of the product itself. For example, in the case of the *Federal Cordage Company, Inc.* (Docket No. 5959), it was shown that the facts not revealed by the company had a bearing upon the quality of the merchandise which was offered for sale. In that case it was found that a substantial portion of the rope and cordage which the company fabricated was made from previously used fibres obtained from howsers and rope, which it purchased from government agencies. The Commission also made the finding that "yarns composed of new fibre have greater tensel strength than those obtained from used howsers and rope." Thus, it is apparent that the facts not revealed by the seller in that case did have a bearing upon the quality of the merchandise. Consequently, the Commission required the company to reveal in the labels the fact that the merchandise was made from previously used material. In the Double Eagle case however, the fact that its product is made from previously used material does not have any bearing whatever on the quality of the product because oil does not wear out in the sense that rope wears out: and when oil is re-refined, it is identical to that which is made from virgin crude. Thus in the Double Eagle case the unrevealed facts with respect to the origin of the

raw material have no bearing on the quality of the product itself. Then, again, in the case of *A. S. Buller and Company* (Docket No. 4193), it was found that the company salvaged old fruit jars, cleaned them, dressed them up with new caps, packaged them in new boxes and offered them for sale without revealing that they had been previously used. But the jars still retained their identity as "used merchandise", and the Commission required the company to reveal that fact in the labels. If, however, those jars had been melted down in a glass furnace and that same glass made into fruit jars, there would have been no question about the fact that they were new jars, since they would have lost their identity as previously used jars in the remanufacturing process. The same is true with respect to previously used oil. It loses its identity as "used oil" in the re-refining process. Then again, in the case of the rebuilt automobile springs (Docket No. 5951 and 6029), the companies did not disclose the fact that their springs were rebuilt from previously used springs. Thus, the facts not revealed by the seller had a bearing on the "identity" of the springs as previously used merchandise. Consequently, the Commission required the companies to reveal the fact that the springs were made up in part of previously used springs. However, if those previously used springs had been melted down in a furnace as scrap iron and made into new springs, they then would have lost their identity as "used springs" and would have been new springs in every sense of the word. The same is true with respect to previously used oil when it is actually refined again. It loses its identity as previously used material. Double Eagle's product is "new oil" in every sense

of the word. All oil is millions of years old. Therefore, the expression "new oil" can mean but one thing, "newly refined oil", no matter whether that refers to the first time it is refined or a subsequent time. When oil is newly refined, it is in every respect "new oil." Judge Breitenstein in his dissenting opinion said:

> "Certain facts shown by the uncontradicted evidence are pertinent. After crude oil is taken from the ground, it is refined first to secure the more volatile distillates such as gasoline. The residuum is then refined again to obtain lubricating oils. Oil does not lose its chemical composition or its molecular structure by use. It does not wear out. The petitioner takes oil which has been drained from automobile crankcases and refines it just as the residuum of crude oil is refined after the capture of the more volatile distillates. The product so obtained has as high quality as that obtained from the the residuum of the gasoline distillation.
>
> "Many minerals are processed and reprocessed and used and re-used over and over again. In this regard oil is no different from iron, gold and silver. The saving, accumulation, and reprocessing and re-use of dental gold, silver ornaments and automobile steel does not differ in basic concept from the similar operations in regard to oil disclosed by this record.[1] The assumption that a purchaser is deceived when he buys a good oil derived from a secondary processing operation is no different from an assumption that a purchaser of a new automobile is deceived if the steel in that automobile has been derived from the processing of scrap iron obtained from a junkyard."

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[1] The most common use and re-use of a natural resource probably occurs in the utilization of water.

Thus, it is evident that the origin of the material from which finished oil is made has no bearing on the quality or identity of the product itself. Therefore, the failure of the United States Court of Appeals to recognize that there is a substantial difference between the nature of oil and materials which wear out with usage and which do not lose their identity as "used materials" when remanufactured, has led it to an erroneous conclusion.

No Deceptive Arts or Practices

2. It is not disputed that nondisclosure of facts concerning the origin of a raw material can contribute to deception within the meaning of the law when coupled with overt deceptive acts and practices calculated to mislead the public, as is shown in the case of the Royal Milling Company (*Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212, 217). In that case the managers of the company not only withheld facts concerning the origin of the material from which their product was made, but coupled that nondisclosure with the overt deceptive act of publicizing the name as a "milling" company when in fact they ground no grain themselves but mixed and blended flour which they purchased already ground. They also circulated written and printed circulars among the trade which either directly asserted or were calculated to convey the impression that their product was composed of flour manufactured by themselves from wheat. Thus, the violation was clear and the Supreme Court upheld the Commission's order against the company. But in the instant case the Double Eagle Company has engaged in no overt deceptive act or practice calculated to mislead the public even re-

motely comparable to that practiced by the Royal Milling Company. The fact that Double Eagle packages its oil in cans of the same size and general appearance as those used for the identical product by other companies is merely evidence that Double Eagle is conforming to the established industry method of marketing that identical product, and is not proof of an overt deceptive practice calculated to mislead the public. The Double Eagle case differs so clearly from the *Royal Milling Company* case on the question of overt acts of deception that the two cases are not comparable. Therefore, in order to make a useful comparison, take a hypothetical case. Suppose, for example, that instead of using the name, "Royal Milling Company", the managers had used the name, "Royal Flour Company" and suppose they had circulated no misleading advertising matter and engaged in no overt deceptive acts and practices calculated to mislead the public. Then, under those circumstances, the case would be comparable to the Double Eagle case. The same allegations of violation of the law could be made against the hypothetical company as is made against Double Eagle. It could be alleged; for example, that since the "Royal Flour Company" markets its product in flour sacks of the same size and general appearance as is used by flour companies who mill their own flour, that unless the "Royal Flour Company" discloses in the label that its product is made from previously milled flour purchased from other companies, it will be in violation of the law because members of the purchasing public will be deceived and misled into the erroneous belief that "Royal Flour Company's" product is made from flour which was ground by the "Royal Flour Company" itself. How-

ever, in neither the hypothetical case nor the Double Eagle case could the Supreme Court point to overt deceptive acts and practices as it did in the "*Royal Milling Co.*" case and say that because of these dishonest practices, the company is in violation of the law.

The Commission and in turn the United States Court of Appeals apparently rely heavily upon the case of the Royal Milling Company to support the decision against Double Eagle, but the acts and practices which were calculated to mislead the purchasing public in the *Royal Milling Company* case are not present in the Double Eagle Refining Company case. In the case of the Royal Milling Company, the belief which presumably caused some of the customers to buy its product was deliberately fostered in their minds for that purpose by the company with its overt deceptive advertising practices. On the other hand, in the case of the Double Eagle Company, any belief which the customers may have with respect to the origin of the oil is not the result of any deceptive acts or practices on the part of the company calculated to mislead the customers and thereby induce them to buy its product. In the case of the Royal Milling Company some of the customers bought its product because they believed there was some advantage in price and perhaps in quality, but they were wrong. There was no advantage either in price or quality. They had been deceived by the deceptive advertising practices of the company which were calculated to do just that. On the other hand, in the case of the Double Eagle Company, if there are those customers who buy its oil because they believe they are getting the quality

which comes from virgin crude, then they are right. They are not deceived. That is exactly the quality they get. Here again the factor of the enduring nature of oil is the key to a proper understanding of the case. The reason the customers are not deceived is because Double Eagle's product is identical to that made from virgin crude and the reason it is identical is because oil does not wear out. This is the distinguishing factor which the court has refused to recognize.

Also in the *Haskelite* case there was the deceptive act of imitating the genuine product coupled with nondisclosure (*Haskelite Mfg. Corp.* v. *Federal Trade Commission*, 127 F.2d 765). The company advertised lap trays as being made from hardwood, when, in fact, they were surfaced with a processed paper which simulated hardwood. The Court enforced the Commission's order requiring the company to stop advertising its product untruthfully. The paper surfaces on the trays were such a good imitation of hardwood that if the seller remained silent the public would be deceived by the imitation. Therefore, the Court enforced the Commission's order requiring the company to disclose in the labels that the surfaces of the trays were made of paper. The company deliberately imitated the genuine article with a synthetic article which deceived the public. That was calculated deception. If the lap trays had been what they seemed to be, there would have been no deception. In the Double Eagle case there is no deception. There is no synthetic product. It is the genuine product. It appears to be new oil, and it is new oil. Here again, the enduring nature of oil must be recognized in order to make a proper decision, in this case. There is no

deception because the product is genuine. And the product is genuine because oil does not wear out and when it is re-refined, it is "new oil"—a factor which the court refused to recognize and therefore erred in its decision.

No Question of Foreign Origin

3. It is well settled that nondisclosure of the facts concerning materials of foreign origin is a violation (*L. Heller & Son, Inc., et al.* v. *Federal Trade Commission*, 191 F.2d 954; *American Tack Co., Inc., et al.* v. *Federal Trade Commission*, 211 F.2d 239). But in the Double Eagle case there is no question of materials of foreign origin.

A New Question of Federal Law

It has already been settled (1) that nondisclosure of facts concerning materials of foreign origin is a violation; (2) that nondisclosure of facts which have a bearing on the quality or identity of the product is a violation; (3) that nondisclosure coupled with overt deceptive acts and practices is a violation. But it has not been settled that, in the absence of any of these three conditions, it is still necessary to disclose in the label any fact that repels customers even though the customers are repelled because they are misled and deceived by the disclosure of such fact. None of the three conditions set forth above are present in the Double Eagle case. There is no question of foreign origin. There is no overt act of deception. And a disclosure in the label that Double Eagle's product is made from previously used oil would contribute no information whatever concerning its quality or identity.

A Misleading Label

1. But such a label would give the customers the erroneous impression that the product is a secondhand product and consequently, inferior in quality. The very fact that it would bear a label of that kind would in itself raise doubts as to its quality. The public would be forced to the conclusion that the label must have some purpose and since it obviously would not be for the purpose of "puffing" the product it would inevitably have the effect of downgrading it. The competitive products made from virgin crude, although identical, would not be so labeled, and it would be impossible to convince customers that there was not something wrong with a product which must declare in the label that it is made from a previously used material. No amount of explanatory advertising could prevent the public from getting the impression that the product was inferior in quality. Therefore disclosure, no matter how it would be stated, would give the impression that the product is an inferior product. Such an impression would be erroneous and false, and the label, although literally true, would be misleading and deceptive and thereby unlawful. The courts have said that even though a label is literally accurate, if it gives a false impression, it may be prohibited. (*Kock* v. *Federal Trade Commission*, 206 F.2d 311; *Consolidated Book Publishing Co.* v. *Federal Trade Commission*, 53 F.2d 942, 944.) No matter how Double Eagle might state the fact that its product is made from previously used oil, the effect of such a label inevitably would be to give the erroneous impression that the product itself is a secondhand product and consequently inferior in quality. Therefore, the decision of the United

States Court of Appeals requiring Double Eagle to so label its product will result in the exploitation of public ignorance for the benefit of those competititors who sell the identical product but who make it from virgin crude. The Commission in support of its decision quoted the following from the *Algoma Lumber* Case (*Federal Trade Commission* v. *Algoma Lumber Company*, 291 U.S. 67, 54 Sup. Ct. 315, 317, 78 L.Ed. 655).

> "In such matters the public is entitled to get what it chooses though that choice may be dictated by caprice, or by fashion or perhaps by ignorance."

The United States Court of Appeals likewise cited this case in support of its decision. There is no dispute with respect to the doctrine set forth in the quotation. The dispute is with its application because the two cases are not comparable. The Double Eagle Refining Company has engaged in no deceptive practice while the Algoma Lumber Company practiced the most flagrant deception. It sold yellow pine under the label of "California White Pine." The customer did not get what he chose but was supplied with a substitute. On the other hand when a customer buys Double Eagle's product, he gets exactly what he chooses no matter what dictates his choice. But the United States Court of Appeals has affirmed an order which requires a product to be so labeled that because of the ignorance referred to in the quotation the customer will be deceived and misled into believing erroneously that the product is inferior in quality when it is not. Therefore, the order will result not merely in indulging the public ignorance as is indicated by the quotation, but that

order will result in the exploitation of that public ignorance for the benefit of those competitors who make the identical oil but make it from virgin crude.

Adverse Customer Reaction

2. The United States Court of Appeals for the Tenth Circuit has held that nondisclosure of the fact that Double Eagle's product is made from previously used oil deceives and misleads the public and has relied upon the "adverse customer reaction" which Double Eagle contends would result from such a disclosure for proof that the customers are deceived and misled unless that fact is disclosed. In other words, the court has held that the "adverse customer reaction" to the disclosure of that fact is proof that nondisclosure of that particular fact is a violation even though that "adverse customer reaction" results from an erroneous impression caused by the said disclosure. Apparently the court has overlooked the fact that the "adverse customer reaction" is the result of the deceptive and misleading label which its own decision would require Double Eagel to place upon its product. It is no answer to say that the order does not specify the language of the disclosure, since there is no way it can be stated which would not repel the customers. Thus, the court would require a disclosure which would so deceive and mislead the customers with respect to the quality of the oil as to cause them not to buy it, and then refer to that "adverse customer reaction" as proof that the misleading label is required by law. This is an untenable position, and fortunately it has not been settled that "adverse customer reaction" to a fact concerning the origin of a raw material

is proof that nondisclosure of that fact is a violation. There are a number of products, on the market which would suffer a reduction in sales if certain facts concerning the history of the materials from which they are made were disclosed in the label. For example, some of the most expensive writing paper is made from discarded rags. But the manufacturers are not required to disclose that fact in the labels. Some jewelry is made from gold which was previously used as crowns, bridges and fillings in people's teeth, but there is no requirement that the jewelry be labelled as made from previously used dental gold. Cashew nuts come from India and are shelled by the natives treading on them with their bare feet, but that fact is not publicized in the label on the nuts. The secretion of the Civit cat is widely used in the manufacture of perfume and undoubtedly the disclosure of that fact in the label would repel customers, but the manufacturers have not been required to so label their product. Beverage companies which are located on a muddy river would suffer a decrease in sales if they were required to disclose in the label that their beverage is made from river-water. These are only a few examples of facts which if disclosed in the labels would repel customers. But this Court has not held that "adverse customer reaction" to the disclosure of a fact is proof that nondisclosure of that particular fact constitutes deception of the purchasing public within the meaning of Section 5(a) of the Federal Trade Commission Act.

II.

This Writ should be allowed because the United States Court of Appeals has decided important questions of Federal law in a way in conflict with applicable decisions of this Court.

It has affirmed a finding of the Federal Trade Commission which is arbitrary and not supported by the evidence.

A Theoretical Public Preference

1. The Commission's finding that there is a public preference for oil made from virgin crude is theoretical. Such a public preference is non-existent. No plausible reason has been given why a customer would prefer a particular origin in the raw material if the real purpose behind that preference were not quality. The Commission's entire case is built upon the assumption that there is a public preference for motor oil produced from virgin crude, but such a preference is theoretical; it does not exist. Judge Breitenstein said in his dissent:

> "The deception is inferred from the *assumption* that the buying public prefers lubricating oil produced from virgin crude" (Emphasis supplied).

A "public preference" in the legal sense in which it is used here implies the existence of an opinion which is already formed in the public mind for or against something. A public prejudice, likewise, means a pre-judgment which already exists in the public mind for or against something. But in the instant case there cannot be a pref-

erence already formed in the public mind for oil made from virgin crude, because most members of the general public have not even given the subject a thought. It is significant that there is not one shred of evidence in the record of this case to show that the general public has the slightest interest in the different methods of producing motor oil or in the raw material from which it is produced. On the other hand, there is the testimony of Mr. Kerran (T. 132) who said in reference to the members of the general public: "I don't believe they think and I don't believe they care." When all of the people who make up the purchasing public are considered, such as housewives, highschool students, college students, pre-occupied business and professional men and women, it is not plausible to believe that when they drive into service stations for motor oil, that they have a pre-conceived preference for any particular origin in the raw material from which oil is made. In fact, it is not plausible to believe that they have given that subject any thought at all. It is said that the members of the purchasing public assume that the oil which they buy is made from virgin crude, but in answer to a question on this point, Mr. Kerran (T. 133) said: "I don't think they assume anything * * * They don't know anything about oil * * * The customers buy oil more on the recommendation of a service station owner or operator than any other reason." Thus, according to the evidence, the average customer does not assume anything about the raw material from which oil is made. All he assumes is that the company whose brand it bears has done whatever is necessary to make a good oil, or that the service station attendant who recommends it knows

good oil and is honest in his recommendation. In short, the average customer buys as a result of his confidence in a brand name or in the integrity of the service station attendant and does not have a pre-conceived opinion already formed in his mind with a preference for a particular origin in the raw material from which oil is made. When a person has never given a thought to a subject or shown the slightest interest in it, he could not have a preference in the sense that the expression "public preference" is used here.

In the instant case the alleged "public preference" is non-existent. It is possible that a so-called "preference" might be created *after* a customer had read the required label. But the expression "public preference" in the legal sense in which it is used by the Commission means the *existence* of an opinion and not the *creation* of one. It is entirely plausible to believe that if a person who had never given the subject a thought should be asked the question, "which do you prefer, oil made from previously used oil or from virgin crude?" that he would answer, "I prefer oil made from virgin crude", because the question itself would create a doubt in his mind about oil made from previously used oil. In other words, the question would create a preference where none had previously existed. But the existence of circumstances from which a preference can be *created* does not constitute a "public preference" in the sense in which the term is used in this case. A public preference in the sense in which it is used here is something that the public has thought about. It is a preference about which there is little doubt. In fact, in the case of a bona fide "public preference" it is not necessary

to "take a blood test" in order to determine, if there IS a public preference, and what that "public preference" is. For example, no one denies that there is a "public prejudice" against secondhand merchandise. It is this public prejudice" which the Commission has undertaken to utilize as the basis for its finding that there is a public preference for oil made from virgin crude. But it cannot be correctly said that because a customer prefers "new merchandise" over used merchandise he, therefore, has a preference for oil made from virgin crude over re-refined oil, because the oil in both cases is "new merchandise." Here again the court's refusal to distinguish between materials which wear out and oil which does not wear out leads to error. The required label would give the customer the erroneous impression that Double Eagle's product is secondhand and the customer then, AFTER reading the misleading label, might not buy the product because the label would have given him the erroneous impression that the product is a secondhand product. But that would not prove that he has a preference for oil made from virgin crude. It would only prove first that he has a prejudice against used merchandise, and second that he was deceived by the label. The alleged public preference upon which the Commission's case rests is entirely theoretical, even specious because it is nonexistent. When a customer buys a can of Double Eagle oil, there is no deception because there is no pre-conceived idea about the origin of the raw material from which it is made, and where there is no pre-conceived idea there can be no deception.

Public Preference for Quality

2. The Commission's finding that there is a public preference for oil made from virgin crude is arbitrary because the *public prefers performance, not pedigree.* The public preference is for quality in motor oil and not for any particular origin. The Commission has based its case upon the assumption that there is a public preference for oil made from virgin crude. The Commission contends that the origin of the oil means more to the customer than the quality. This is contrary to human nature. In the purchase of motor oil, the public prefers quality above everything else. Not even the price which plays such a large part in the purchase of other merchandise seems to affect the customer when it comes to the purchase of lubricating oil for his automobile. The average customer has in mind only one thing when he goes to purchase motor oil—and that is to get a good oil. He is not interested in what it WAS, but in what it IS. He wants performance, not pedigree. Any seeming preference for a particular origin in motor oil would be merely a means to the end of securing quality.

The undisputed evidence in this case shows that 30 to 40 per cent of customers who drive into filling stations and ask to have the oil changed request a trade brand (T. 133 and 184). These customers order lubricating oil by trade brands because they have confidence in the established reputations of the company for producing good oil. The undisputed evidence also shows that 60 to 70 per cent of the customers trust to the integrity and experience of the service station attendant to give them "a good oil." Even Mr. H. B. Stoll, the one witness upon whom the

Commission depends for support of its finding that there is a public preference for a particular origin in oil, testified (T. 184) that you have to sell the customer on the "merits of the oil, that it is a good oil * * *." Furthermore (T. 168), Mr. Stoll testified that, "In my experience the public would rather have a virgin crude * * *." And then he explained, *"that is what I would term a quality motor oil* * * *" (Emphasis supplied). This testimony of the Commission's star witness indicates that the customers seeming preference for any particular origin in the oil is merely the means to the end of securing his real preference which is quality.

Another Government witness Mr. Cameron Kerran testified (T. 132 and 133): "Most people I think when they buy oil, they don't buy it on whether it is re-refined oil * * * or virgin oil * * * They buy it because it does a good job for them. They are either sold on the brand, or they are sold on the company that makes it. They feel like that company is a reputable company, and they buy it for quality * * * the reason they buy that oil is because it had done a job for them before, and they are satisfied with the job that it has done. They don't know anything about oil. You can go out here and ask ten people why they buy a certain oil, and he will say, 'my service station man told me this was a pretty good oil'."

These are the only two witnesses who testified on the question of public preference with respect to lubricating oil. This evidence makes it clear that the purchaser's real "intention and desire" is for QUALITY in motor oil above anything else.

In the case of the Ohio Leather Company (*Ohio Leather Co. v. Federal Trade Commission*, 45 F.2d 39), it was shown that the company had put upon the market a certain kind of soft leather under the trade name of "Kaffor-Kid." The leather was made from calfskin, but it had the qualities of kid. The Commission ordered the company to cease using that name. But the United States Court of Appeals for the Sixth Circuit pointed out that the public preference might well be for the quality of kid which was to be found in the leather, rather than for its origin. The Court also pointed out that in the absence of supporting evidence, the Commission could not assume that the purchasing public had a preference for origin over quality. The language of the Court in that case is particularly applicable here. The Court said:

> "Certainly the initial presumption must be that the purchaser at a retail store, when he buys kid shoes, or kid gloves, would suppose he was getting precisely what the word indicated and not something else; but if, in the absence of any proof, this initial presumption is not to prevail, we find much to indicate that the ordinary purchasers of ordinary intelligence, would have in mind chiefly the appearance, feel and quality of the leather, *and would understand that they were asking for these qualities rather than for any specific skin ancestry.*
>
> "There is considerable available information * * * to the effect that the retail buying public understands well enough that the ordinary grades of so-called kid gloves on the market are not kid at all or even goat, but are made of different leathers subjected to manufacturing processes *which give them the feel and quality of kid and that when it asks for 'kid gloves', it is indifferent as to the origin of the leather.*

> "* * * the purchaser is entitled to get what he asks for even if he is put off with something as good or better *but the qualities of the two articles are not immaterial in determining the purchaser's real intention and desire*" (Emphasis supplied).

The Court commented on the fact that the evidence was not adequate to support a finding and refused to enforce the Commission's order because the Commission had made no finding with respect to what constituted the "purchaser's real *intention* and *desire*."

In the instant case the Commission has made a finding that the public preference is for a particular origin in oil but such a preference does not constitute the "purchaser's real intention and desire" because that is for *quality* in motor oil.

Not Supported by the Evidence

3. The Commission made a finding that there is a public preference for motor oil which is made from virgin crude, but that finding is not supported by the evidence. Judge Breitenstein said in his dissent:

> "With due deference to administrative expertness in fact finding, I see nothing in the record to sustain a finding that the public prefers lubricating oil produced from virgin crude. As testified, in substance, * * * the purchaser desires quality and buys by brand names."

The only evidence in the entire record of this case on that question is the testimony of two witnesses both of whom were called by the Commission. Both by experience and

training had had about the same opportunity to judge the preference of the public on this question. One of these witnesses was Mr. Cameron Kerran, a partner in the Double Eagle Refining Company. He had spent the past eight years refining and selling oil, and preceding that, except for the time he was in service, he was studying petroleum engineering at the University of Oklahoma.

The other witness was Mr. H. B. Stoll, a distributor for Phillips Petroleum Company. He testified (T. 175 and 176) that Mr. Hundley; a Phillips Petroleum Company man, came to see him and asked him to testify for the Commission. Most of Mr. Stoll's experience as a service station attendant dates back before the re-refining industry came into being. In recent years he has spent very little time actually servicing cars on the driveway. He has never sold a can of re-refined oil. He never worked at a station that handled re-refined oil. His testimony was "opinion evidence." He said that he talked to many people about re-refined oil, but he did not state that any person had ever expressed a preference for oil produced from virgin crude. In all of his testimony he did not refer to a single specific instance, conversation or occasion where a customer had expressed such a preference. When he was being pressed on cross-examination to name one customer or one person who had expressed such a preference he had plenty of opportunity, without actually naming any one, to have recited a particular conversation or to have recalled a specific occasion or circumstance, or in some way to have identified something specific and definite which would have given substance to his testimony. But he did not. He spoke in generalities. It is well settled that in

order for "opinion evidence" of this kind to be of much value, it must be based upon specific and definite experiences. For example, a saleslady at a perfume counter, could give valuable "opinion evidence" as to the public preference for a certain brand of perfume by basing her opinion upon the number of customers who ask for that particular brand. But in all of the pages of Mr. Stoll's testimony, there is not one solid fact upon which his "opinion evidence" is based. Nevertheless, the Commission's entire case rests upon the slim reed of evidence supplied by this one witness whose testimony actually gives support to both sides of this question, as shown by the quotations given above.

It would be difficult to justify a finding on the basis of the "opinion evidence" provided by the diluted testimony of this one witness, even if there were no opposing evidence. But there is opposing evidence. There is the other witness, Mr. Cameron Kerran, who has had equal opportunity to judge the "real intention and desire" of the public on this question, and his testimony completely answers and denies that part of Mr. Stoll's testimony which would give support to the Commission's finding. He said (T. 132) that most people don't buy oil "on whether it is * * * re-refined oil or virgin oil * * * they buy it for quality * * *."

Even though the Commission is permitted wide discretion in weighing evidence, it cannot call two witnesses with qualifications as nearly equal as these two and also with incentives for possible bias as nearly equal as these two and base its entire case upon the favorable part of

the testimony of one of these witnesses, while ignoring completely the very opposite and undiluted testimony of the other. Even the wide discretion allowed the Commission under the law could scarcely be stretched to permit it to accept that part of the evidence which supports its case and reject in its entirety that part which opposes it. The Commission relied upon the favorable part of Mr. Kerran's testimony and rejected the unfavorable part. It accepted as valid and relied upon that part concerning the organization of Double Eagle Refining Company, the extent of its trade and even the technical nature of its operation. Yet, it rejected completely his testimony on the question of public preference.

This decision is in conflict with the proviso in the statute which says:

> "The findings of the Commission as to the facts *if supported by evidence* shall be conclusive" (Emphasis supplied).

It is ignoring the well-settled point of Federal law which says that the Commission's finding is conclusive UNLESS IT IS ARBITRARY AND NOT SUPPORTED BY EVIDENCE. This Court has defined "evidence", as "substantial evidence" in a long list of important cases. In *National Labor Relations Board* v. *Columbian Enameling & Stamping Co., Inc.*, 306 U.S. 392, 59 Sup. Ct. 501, this Court said:

> "* * * The findings of the Board as to facts, if supported by evidence shall be conclusive. But as has often been pointed out, this, as in the case of other findings by administrative bodies means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably

> inferred. (*Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board*, 301 U.S. 142, 57 S.Ct. 648, 81 L.Ed. 965; *Consolidated Edison Co. of New York* v. *National Labor Relations Board*, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126) * * * Substantial evidence is more than a scintilla and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

It is submitted that the evidence in the instant case does not meet this test; therefore the Writ should be allowed.

B. Furthermore, the Writ should be allowed because the United States Court of Appeals for the Tenth Circuit had decided an important question of Federal Law in conflict with another decision of this Court. In the *Raldam* case (*Federal Trade Commission v. Raldam Company*, 283 U.S. 587) this Court said:

> "The paramount aim of this Act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it to a substantial degree * * *."

In the instant case the United States Court of Appeals in deciding that the nondisclosure of a fact which has no bearing whatever on the product itself constitutes deception within the meaning of Section 5(a) of the Act, has stretched the application of the law to cover a situation it was never intended to cover, and made a decision which will result in no compensating public benefits but in the useless waste of a precious national resource and in defeating the "paramount aim of the Act" by actually restricting

competition. The court in affirming the Commission's finding that there is a public preference for oil made from virgin crude has made a decision that strained the doctrine of public preference to the breaking point and applied the law in a situation where there was no evil to be corrected and no public benefits to result. The court has affirmed the unsupported finding of the Commission that "the real intention and desire" of the public is for a particular origin in oil rather than quality. Thus, the decision of the court to uphold the Commission in preserving the form of this theoretical public preference rather than the substance of the law against deception of the public will result in defeating the purpose of the law by destroying the entire young re-refining industry and thereby restricting competition. In the case of the Algoma Lumber Company this Court supported the Commission in restraining the company from dishonest practices but left it to continue in business on an equal footing with its competitors. In the case of the Royal Milling Company this Court supported the Commission in restraining the company from dishonest practices which deceived the public and placed its competitors at a disadvantage but the order left the company to continue in business on an equal competitive footing. Likewise, in the case of Haskelite Corporation (*Haskelite Mfg. Corporation* v. *Federal Trade Commission*, 127 F.2d 765) this Court upheld the Commission in restraining that company from dishonest practices but left it to continue in business with no handicap in its competition with other companies. In the instant case, however, the Commission's order, which the United States Court of Appeals has affirmed, does not merely restrain the

Double Eagle Company from engaging in deceptive practices because it is not engaging in any such practices, but affirmatively compels it to label its product with a useless and destructive label which will make it impossible for Double Eagle to compete on an equal footing with those other companies who make and sell the identical product but who make it from virgin crude. This is a distinction without a difference—a distinction with respect to the origin of the raw material without a difference with respect to the finished product.

The world has discovered new sources of power and the full utilization of this power requires lubricating oil. The supply of lubricating oil located within the continental United States is limited. Lubricating oil is therefore one of the most valuable national resources. Yet, millions of barrels of this precious national resource are thrown away every year. This is a useless waste. The re-refining industry is a young industry which could save most of this lubricating oil but unless this Court allows the Writ of Certiorari, it will be destroyed and the unnecessary waste of this valuable resource will continue.

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June, 1959.

APPENDIX

APPENDIX I

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of FRANK A. KERRAN and CAMERON L. KERRAN, Individuals and Co-partners, Trading and Doing Business as DOUBLE EAGLE REFINING COMPANY.	)))))	DOCKET NO. 6432

INITIAL DECISION

By William L. Pack, Hearing Examiner.

John W. Brookfield, Jr., for the Commission.
John B. Ogden and Josh Lee, Oklahoma City, Oklahoma, for the respondents.

1. The complaint in this matter charges the respondents with violation of the Federal Trade Commission Act through the sale of lubricating oil made from previously used oil, without disclosing such prior use. After the filing of respondents' answer to the complaint, hearings were held at which evidence in support of the complaint was received. Upon the conclusion of such evidence respondents moved to dismiss the complaint on the ground that a *prima facie* case in support thereof had not been established. This motion was denied by the hearing examiner, whereupon respondents elected to offer no evidence (other than certain exhibits which had been received during the cross-examination of the Government's witnesses), and rested their case upon the record as then made. Proposed findings and conclusions have been submitted by counsel for both sides. Oral argument has not

been requested, probably because the case was argued at length at the time the motion to dismiss was made.

2. The respondents, Frank A. Kerran and Cameron L. Kerran, are copartners trading as Double Eagle Refining Company, with their place of business located at 1900 Northeast First Street, Oklahoma City, Oklahoma. Respondents are engaged in the sale of lubricating oil for use in motor vehicles. They purchase "crankcase drainings", that is, oil which has been previously used in automobile motors, and then subject such oil to certain rerefining processes, after which it is sold to dealers for resale to the public. There is no question as to the interstate character of their business, sales in substantial quantities being made regularly to purchasers located in a number of states other than Oklahoma. Also undisputed is the fact that respondents are in competition in interstate commerce with other sellers of lubricating oils.

3. Respondents' oil is packaged, displayed and sold to the public in metal containers of the same size and general appearance as those in which lubricating oils refined from virgin crude oil are sold. There is nothing on respondents' containers disclosing or indicating that the oil is other than an entirely new product made from virgin crude oil. After examining the containers, an experienced service station operator testified that unless informed to the contrary, he would expect the oil therein to be new and unused oil refined from virgin crude oil, and, further, that from his experience with the public, it was his opinion that the public would expect the same thing. That this is the correct view is obvious from an examination of the containers. Unquestionably, in the absence of clear disclosure by respondents as to the nature of their product, members of the public purchasing their oil would expect a new product, not oil made from previously used oil.

4. Respondents urge that their oil is not merely reclaimed or reprocessed oil, but is oil which has actually been re-refined. They insist that their refining plant is modern and complete, and that when the oil leaves their plant it meets all applicable standards and requirements. They further urge that it is an established scientific fact that oil does not wear out but may be used satisfactorily again and again so long as it is subjected to the proper re-refining process, and that their oil is of just as high quality as oil refined from virgin crude oil. While all of this may be true, the fact remains that the public is entitled to know what it is getting. It is entitled to be informed as to the nature of respondents' product so that it may make its own choice.

5. On certain of their containers respondents use the words "Paraffin Base", thus representing that the oil is paraffin base oil. The complaint challenges the correctness of this representation. The only testimony on this issue is that of respondent Cameron L. Kerran. Mr. Kerran is a college graduate, who specialized in academic courses having to do with petroleum. For some ten years he has been in charge of the operation of respondents' refining plant. He testified that the original oil (crankcase drainings) is usually received at the plant in tank truck loads of several thousand gallons each; that certain recognized scientific tests are used to determine whether the oil is at least 50 per cent paraffin base; that under industry standards oil which is not less than 50 per cent paraffin base may properly be labeled paraffin base; and that only oil meeting this requirement is so labeled by respondents. In view of this testimony it seems clear that this charge in the complaint has not been sustained.

6. The failure of respondents to disclose that their oil is made from previously used oil has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the belief that such oil is new

[APPENDIX]

and unused oil, made from virgin crude oil, and to cause such members of the public to purchase respondents' oil as a result of the erroneous and mistaken belief so engendered. This failure of respondents to reveal the nature of their product also serves to place in the hands of retail dealers a means and instrumentality whereby such dealers may mislead the public with respect to respondents' product. The present proceeding is therefore in the public interest. Respondents' practice is to the prejudice of the public and of respondents' competitors, and constitutes an unfair method of competition and an unfair and deceptive act and practice in commerce in violation of the Federal Trade Commission Act.

BRATTON, Chief Judge:

This proceeding is here on petition to review an order of the Federal Trade Commission. Petitioners Frank A. Kerran and Cameron A. Kerran, partners doing business under the trade name of Double Eagle Refining Company, at Oklahoma City, Oklahoma, are engaged in the business of re-refining previously used lubricating oil, principally crankcase drainings collected at gasoline stations; packaging the re-refined oil in tin cans of the same general size, kind and appearance as those used for packaging lubricating oil produced directly from virgin crude; and selling the re-refined oil without indicating on the containers or otherwise that the commodity is produced from previously used oil. Some of the supply of previously used oil comes to the refinery of petitioners from other states, and some of the finished product is sold and distributed in interstate commerce. The order of the Commission required petitioners to cease and desist from representing, contrary to the fact, that their lubricating oil is refined or processed from other than previously used oil; and from advertising, offering for sale, or selling lubricating oil that is composed in whole or in part of oil which had been reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in advertising and sales promotion material, and by a clear and conspicuous statement to that effect on the container.

The order is challenged upon the ground that the Commission erred in holding that the methods of competition employed by the petitioners are unfair, because the Commission did not base its decision upon all of the pertinent facts of record but upon only a minor part of them; because there is little likelihood that the public is misled since re-refined oil is identical to that which is refined directly from virgin crude; because when previously used

oil is re-refined it loses its identity as previously used oil and is new oil in every sense of the term; and because the circumstances which must accompany seller silence in order for it to constitute an unfair method of competition are not present in the proceeding. It is the position of petitioners that lubricating oil does not wear out; that use does not change the chemical composition of the oil or its molecular structure but merely contaminates it; that contamination from use as well as additives put into the oil by the prior producer are eliminated by the re-refining process; that the re-refined oil which petitioners sell is new oil; and that such re-refined product is the equivalent in quality of lubricating oil produced from virgin crude. Evidence was adduced at the hearing before the hearing examiner to the effect that lubricating oil does not wear out with use; that use does not change the chemical composition of the oil or its molecular structure but merely contaminates it; and that contamination from use as well as additives put into the oil by the prior producer are eliminated by the re-refining process. But the hearing examiner in the first instance found in effect that a substantial portion of the public who purchase lubricating oil prefer new and unused oil to that produced by the re-refining of crankcase drainings and other previously used oil; that the failure of petitioners to disclose that their oil is made from previously used oil has a tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the belief that such oil is new and unused made from virgin crude oil; and that such failure has a tendency and capacity to cause such members of the public to purchase petitioners' oil as a result of the erroneous and mistaken belief so engendered. These crucial findings were adopted by the Commission. They were adequately sustained by evidence adduced upon the hearing and therefore must stand on review. It may be that lubricating oil does not wear out with use. It may be that use does not change the chemical composition or

molecular structure of oil. It may be that contamination from use and additives put into oil by the prior producers are eliminated by the re-refining process of petitioners. And it may be that the oil sold by petitioners is just as good in quality as lubricating oil produced from virgin crude. But the public is entitled to know the facts with respect to the lubricating oil sold by the petitioners being produced from previously used oil and then make its own choice with respect to purchasing such oil or oil produced from virgin crude, even though the choice is predicated at least in part upon ill-founded sentiment, belief, or caprice. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67. And therefore the practice of the petitioners in marketing their re-refined lubricating oil in containers indistinguishable from those used generally to market lubricating oil refined from virgin crude, without any disclosure that it is made from previously used oil, constitutes a deceptive practice within the intent and meaning of Section 5(a) of the Federal Trade Commission Act, as amended, 52 Stat. 111, 15 U.S.C.A. §45(a). *Mohawk Refining Corp., et al.* v. *Federal Trade Commission*, CA-3, — F.(2d) —; *Royal Oil Corp., et al.* v. *Federal Trade Commission*, CA-4, — F.2d —.

Petitioners urge further that the order of the Commission is invalid because the purchasing public is not prejudiced by their methods of competition since the public preference is for quality in lubricating oil and not for any particular origin; because the competitors of petitioners are not prejudiced by the methods of competition which petitioners practice since petitioners do not enjoy any unfair advantage over their competitors; because enforcement of the order would result in actually restricting competition since it would destroy the business of petitioners and other re-refiners and thereby eliminate them as potential competitors of the major oil companies; because it is contrary to public policy to require useless disclosures which would result in injury to a

company engaged in the business of re-refining oil and selling it in interstate commerce; and because it would result in wasting unnecessarily a precious natural resource. The general trend of the argument in support of the several grounds of challenge to the order is that the practices of petitioners do not prejudice the public; that they do not prejudice the competitors of petitioners; that disclosure would result in injury to the business of petitioners; and that disclosure would result in waste of a natural resource. But section 5(a) of the Act, *supra*, as amended in 1938, declares unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce to be unlawful; and with exceptions not having any present material bearing, it empowers the Commission to prevent such methods, acts, or practices. Under the statute, as amended, the Commission is vested with power to prevent the use of unfair methods of competition in commerce and also to prevent the use of unfair to deceptive acts or practices in commerce. Under the enlarged sweep of the statute, the Commission may take appropriate action to prevent unfair or deceptive practices in commerce which are inimical to the public interest. *Thomas* v. *Federal Trade Commission*, 116 F.(2d) 347; *Wolf* v. *Federal Trade Commission*, 135 F.(2d) 564; *Globe Cardboard Novelty Co.* v. *Federal Trade Commission*, 192 F.(2d) 444; *Koch* v. *Federal Trade Commission*, 206 F.(2d) 311. The vice in the acts and practices of petitioners lies in the deception of the purchasing public of lubricating oil with respect to the oil sold by petitioners being re-refined oil instead of refined oil from virgin crude. And that vice constitutes an unfair and deceptive business practice within the intent and meaning of Section 5 of the Act, *supra*. *Mohawk Refining Corp., et al.* v. *Federal Trade Commission, supra; Royal Oil Corp.* v. *Federal Trade Commission, supra.*

A decree will be entered affirming and enforcing the order of the Commission.

BREITENSTEIN, Circuit Judge (dissenting).

The majority opinion sustains the Federal Trade Commission in requiring the manufacturer of an admittedly high quality domestic product to disclose in its advertising and on its containerlabels the source of its product. It does so in the absence of any claim that such manufacturer has ever made a deceptive or misleading statement in connection with the marketing of the product, re-refined lubricating oil. A deceptive practice is said to result from the marketing of the product "in containers indistinguishable from those used generally to market lubricating oil refined from virgin crude, without any disclosure that it is made from previously used oil." The deception is inferred from the assumption that the buying public prefers a lubricant produced from so-called virgin crude oil.

Certain facts shown by the uncontradicted evidence are pertinent. After crude oil is taken from the ground it is refined first to secure the more volatile distillates such as gasoline. The residuum is then refined again to obtain lubricating oils. Oil does not lose its chemical composition or its molecular structure by use. It does not wear out. The petitioner takes oil which has been drained from automobile crankcases and refines it just as the residuum of crude oil is refined after the capture of the more volatile distillates. The product so obtained has as high quality as that obtained from the residuum of the gasoline distillation.

Many minerals are processed and reprocessed and used and re-used over and over again. In this regard, oil is no different from iron, gold and silver. The saving, accumulation, reprocessing and re-use of dental gold, silver ornaments and automobile steel does not differ in basic concept from the similar operations in regard to oil dis-

closed by this record.[1] The assumption that a purchaser is deceived when he buys a good oil derived from a secondary processing operation is no different from an assumption that a purchaser of a new automobile is deceived if the steel in that automobile has been derived from the processing of scrap iron obtained from a junk yard.

Section 5(a) of the Federal Trade Commission Act, as amended,[2] empowers and directs the Commission to prevent the use of "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." Here the unfair method and the unfair or deceptive practice are said to arise from the use of the same type container as that used by manufacturers who produce from virgin crude and from the failure to disclose on the container that the lubricant is produced from previously used oil. There is nothing unfair or deceptive in using the same, common tin can type of container that is used for a multitude of products. The action of the Commission depends solely on the fact that the source of the oil is not disclosed.

With due deference to administrative expertness in fact finding, I see nothing in the record to sustain a finding that the public prefers lubricating oil produced from virgin crude. As testified, in substance, by the only witness who covered the attitude of the public,[3] the purchaser desires quality and buys by brand names. Granting that a purchaser is entitled to get what he asks for, even if he is put off with something as good or better,[4] quality is material in determining whether there is customer deception in circumstances where there is no misrepresentation.

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[1] The most common use and re-use of a natural resource probably occurs in the utilization of water.

[2] 15 U.S.C., Sec. 45(a).

[3] The witness, a distributor for a major oil company, was called by and testified for the Commission.

[4] See *Ohio Leather Co.* v. *Federal Trade Commission*, 6 Cir., 4[illegible] F.2d 39, 41.

The fact that a buyer desires a good oil or a brand oil does not mean that he has any interest in the origin of that oil. The assumption that the public prefers a lubricant produced from virgin crude does not follow from the fact that the public seeks to buy a good oil. Yet, the Commission makes such an assumption and from it finds a deception.

The product involved here is admittedly of high quality and the petitioner has admittedly made no false statements in regard to either the product or its use. Hence, this is not a case for the Commission to exercise its well-recognized negative power of preventing falsity by forbidding certain conduct. Instead it is one where the Commission exercises an affirmative power to require a statement as to origin for the prevention of a falsity which is not shown to exist.

In the foreign origin cases the power of the Commission to require an affirmative disclosure of origin has been upheld.[5] In such cases, the assumption of a popular preference for homemade goods is entirely reasonable and is supported by the provision of the tariff laws requiring the marking of imported goods with the name of the country of origin.[6]

Royal Oil Corporation v. *Federal Trade Commission*, 4 Cir., — F.2d —, involved reclaimed, not re-refined, oil,[7] and did not discuss the issues raised in this case. It is obvious that the sale of reclaimed oil without appropriate disclosure may be a deception. The same conclusion does

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[5] *Eg. L. Heller & Son* v. *Fed. Trade Comm.*, 7 Cir., 191 F.2d 954; *Amer. Tack Co.* v. *Federal Trade Comm.*, 2 Cir., 211 F.2d 239.

[6] See 19 U.S.C., Sec. 1304.

[7] Reclaimed oil is used oil which has been strained or otherwise treated to remove contaminants. Re-refined oil is oil that has been produced by a refining process similar to that used in producing oil from virgin crude.

not follow when the oil is re-refined as then the quality is as high as that found in oil produced from virgin crude.

Mohawk Refining Corporation v. *Federal Trade Commission*, 3 Cir., — F.2d —, affirmed an order similar to that involved here and did so in a case concerning re-refined oil. Reliance was placed on the statement in *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 78, that the public is entitled to get what it chooses, though the choice be dictated by caprice or ignorance. *Algoma* was a case of mis-labeling.[8] Neither in *Mohawk* nor in the case at bar was there any false labeling. Although the right to make a capricious or ignorant choice is protected against misrepresentation, the recognition of such right does not require that a manufacturer foresee caprice or ignorance and not only refrain from misrepresentation but also affirmatively state every fact regarding his product which might conceivably be deemed important by the prejudiced and uninformed.

Mohawk quotes approvingly from *P. Lorillard Co.* v. *Federal Trade Commission*, 4 Cir., 186 F.2d 52, 58, that: "To tell less than the whole truth is a well known method of deception * * *." The validity of such statement is unquestionable but it has no applicability. The omission here of the statement of source has no relation to the quality or usability of the product. Nondisclosure may amount to a deceptive practice when it is accompanied by an affirmative act calculated to deceive, when it has a bearing on quality or usability, or when the nondisclosed facts pertain to national policy. None of these situations is found here.

It may be that advertisements and labels should be much more informative than they ordinarly are in current custom and practice. But Congress has never given to the Commission unrestricted power affirmatively to require

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[8] "Yellow pine" lumber was falsely labeled as "white pine."

informative statements. Its pertinent power is limited to the prevention of unfair methods of competition and unfair or deceptive acts or practices in commerce. Granting that the Commission is the expert body to determine the remedy necessary to eliminate such methods or practices,[9] nevertheless, the affirmative function of requiring informative disclosures may only be exercised to prevent unfairness or deception.[10] Believing as I do that nondisclosure of source of origin of product, standing alone and unaccompanied by any of the factors which I have mentioned, does not constitute unfairness or deception, I am brought to the conclusion that there is no rational basis for the findings, and no legal basis for the order of the Commission. It is not necessary to comment on the far-reaching implications of the Commission's action under present conditions wherein scientific advances establish methods of reprocessing without loss of quality and thus permit the use and re-use of many substances which are in limited supply.

I most respectfully dissent from the opinion of my associates.

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[9] *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 612.

[10] *Cf. Alberty* v. *Federal Trade Commission*, D.C. Cir., 182 F.2d 36, 39, *cert. denied*, 340 U.S. 818.

APPENDIX II

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

John W. Gwynne, Chairman
Robert T. Secrest
Sigurd Anderson
William C. Kern
Edward T. Tait

In the Matter of Frank A. Kerran and Cameron L. Kerran, Individuals and Co-partners, Trading and Doing Business as Double Eagle Refining Company.	)))))	Docket No. 6432

OPINION OF THE COMMISSION

By Anderson, Commissioner:

Respondents in this proceeding have appealed from the hearing examiner's initial decision holding that they have violated the Federal Trade Commission Act by distributing in commerce lubricating oil without disclosing that it is made from previously used oil. The complaint herein also challenged the correctness of respondents' representation that certain of its product consist of a "paraffin base." The hearing examiner found that, under industry standards, oil which is not less than 50 per cent paraffin base properly may be labeled "paraffin base" and that only oil meeting this requirement is so labeled by respondents. The initial decision, therefore, held that the allegations of the complaint in this latter respect were not sustained. No appeal was taken from that ruling. Consequently, the issue before the Commission upon the appeal of respondents is whether respondents' failure to

disclose their oil as previously used constitutes a violation of the Federal Trade Commission Act.

The complaint in this connection charges in effect that respondents' oil consists of used oil, obtained from drainings of motor crankcases and from other sources, which is reclaimed or reprocessed by the respondents. It is alleged that the reprocessed oil is sold in containers similar in size and appearance to those used for new oil and that it has the appearance of new and unused oil. The complaint further sets out that these containers bear no markings of any nature disclosing that the product is reclaimed or reprocessed used oil. According to the complaint, in the absence of disclosure on the containers that the oil therein is used, reclaimed or reprocessed, the general understanding and belief on the part of the dealers and purchasing public is that oil sold in containers such as are used by respondents is, in fact, new oil and not used, reclaimed or reprocessed oil.

The hearing examiner in his initial decision found that respondents purchase "crankcase drainings" which is subjected to certain re-refining processes and then sold to dealers for resale to the public. He further found that respondents' oil, as alleged, is packaged, displayed and sold to the public in metal cans of the same size and general appearance as those in which lubricating oils refined from virgin crude oil are sold, and also that there is nothing on respondents' containers disclosing or indicating that the oil is other than an entirely new product made from virgin crude oil. He concluded that, in the absence of clear disclosure as to the nature of the product, members of the public purchasing respondents' oil would expect a new product, not oil made from previously used oil. This conclusion is drawn in part from the testimony of an experienced service station operator with twenty-five years in the oil business who stated that from his examination of respondents' containers, he was unable to

determine whether they contain new or previously used oil; that in his experience the public had a preference for lubricating oil made from "* * * virgin crude, or original crude oil, or original motor oil that is what I would term a quality motor oil that's first run." This witness also testified that his personal preference also is for a "first run oil" and that unless he sees the word "re-refined" on containers, he expects to find virgin oil therein and that, based on his experience, the public expects the same.

Respondents in their appeal brief have set out "Ten Important Facts" as being established by evidence of record and offers of proof. The evidentiary facts referred to by respondents, and the offers of proof adverted to, with two exceptions, all are relevant only to the subject of the quality of respondents' re-refined oil as compared with lubricants made from virgin crude. We are not concerned in this proceeding with whether or not respondents are offering to the public a "high quality" product "just as good as" competitive products. Such matters are immaterial to the issue before us. That issue relates to whether respondents' failure to disclose that their oil is made from previously used oil has the tendency and capacity to mislead and deceive the purchasing public into the belief that such oil is new and unused oil, made from virgin crude oil. It involves the question of whether the public is led to purchase respondents' oil as a result of the erroneous and mistaken belief so engendered. A subsidiary issue is whether, as further alleged in the complaint, such failure to reveal the nature of the product also serves to place in the hands of unscrupulous or uninformed dealers a means and instrumentality whereby such dealers may mislead the public with respect to respondents' product.

One of two exceptions in the "important facts" listed by respondent is the statement that "Double Eagle oil is a paraffin base oil." The hearing examiner ruled, as we

have seen, that the predominant base of respondents' oil is paraffin and, no appeal having been taken from that ruling, the matter no longer is in issue. The second exception we noted about is respondents' statement that "The Double Eagle Refining Company has not misbranded or untruthfully labeled any of its products." This statement has implicit in it the entire issues in the case and will be fully discussed hereinafter. It is the only one of the "Ten Important Facts" material to the appeal before us.

In contending that the initial decision should be set aside as erroneous, the appeal argues that failure to disclose on labels the "previous state of the oil" before the refining process has no effect whatever on the finished product. This point as developed by respondents' counsel in the appeal brief and on oral argument, of course, goes again to the matter of the quality of the oil and, in the opinion of the Commission, is not germane to the question before it.

The Commission is of the opinion that the record supports the hearing examiner's finding that in the absence of clear disclosure members of the public purchasing respondents' oil would expect a new product, not oil made from previously used oil. We agree that the pubic is entited to know what it is getting and that it should be informed of the nature of respondents' product so that it may make its own choice between lubricants made from virgin crude and lubricants made from used oil. As the Supreme Court said in the *Algoma Lumber Co.* case,[1] in holding that whether the substituted product is as good or better than the original product is immaterial:

> "The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else.

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[1] *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 78 (1934).

Federal Trade Commission v. *Royal Milling Co.*, 288 U.S. 212, 216; *Carlsbad* v. *W. T. Thackeray & Co.*, 57 Fed. 18. In such matters the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance."

Or, as the same Court said earlier in the *Royal Milling Co.* case: [2]

> "The result of respondents' acts is that such purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might not buy *if correctly informed as to its origin.* We are of the opinion that the purchasing public is entitled to be protected against that species of deception, and that its interest in such protection is specific and substantial" (Emphasis supplied).

Respondents recognize the rationale of these decisions and do not dispute their doctrine. They argue, however, that in requiring a product to be labeled truthfully as being made from used oil, because of the ignorance of the purchasing public, it "will be misled into believing that it is a low grade product, when actually it is a high grade product" and that it would be unfair to require the use of a label which would "cause the public to undervalue a product" and which, "because of the erroneous impression it would give to the public, would *decrease* the sales * * *." Respondents in advancing this contention tacitly admit, in effect, that many members of the public are prejudiced against oil made from previously used oil and that they have a preference for oil made from virgin crude. If consumers have that preference, it cannot be satisfied by imposing upon them a similar article, or one equally as good, but having a different origin. *Federal*

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[2] *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212, 217 (1933).

Trade Commission v. *Algoma Lumber Co., supra; Federal Trade Commission* v. *Royal Milling Co., supra;* and see, *Benton Announcements, Inc.* v. *Federal Trade Commission*, 130 F.2d 254 (C.A. 2, 1942); *Ohio Leather Co.* v. *Federal Trade Commission*, 45 F2d 39 (C.A. 6, 1930).

In the light of the above and in the interest of clarity, the order contained in the initial decision is being modified. The respondents' appeal is denied and the initial decision, modified as noted above, is adopted as the decision of the Commission.

Commissoner Tait did not participate in the decision herein.

February 14, 1958.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	3
Conclusion	6

CITATIONS

Cases:

Federal Trade Commission v. *Algoma Lumber Co.*, 291 U.S. 67	3, 4
Federal Trade Commission v. *Royal Milling Co.*, 288 U.S. 212	4
L. Heller & Son, Inc. v. *Federal Trade Commission*, 191 F. 2d 954	4
Mohawk Refining Corp. v. *Federal Trade Commission*, No. 84, October Term, 1959	2, 3
P. Lorillard Co. v. *Federal Trade Commission*, 186 F. 2d 52	4

Statute:

Federal Trade Commission Act, Section 5 (38 Stat. 719, as amended, 15 U.S.C. 45):	
Section 5(a)(1)	2
Section 5(a)(6)	2

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 125

DOUBLE EAGLE REFINING COMPANY, Frank A. Kerran and Cameron L. Kerran, Individuals and Co-Partners, Trading and Doing Business as DOUBLE EAGLE REFINING COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. V-XIII) affirming the Federal Trade Commission is reported at 265 F. 2d 246. The opinion and order of the Commission are set forth in the Transcript of Record (R. 34-41).

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1959. The petition for a writ of certiorari was filed on June 18, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Commission, proceeding under Section 5 of the Federal Trade Commission Act, was warranted in requiring that petitioners disclose the used-oil source of the motor oil which they market.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45) provides in relevant part:

> Section 5(a)(1) Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * *
>
> Section 5(a)(6) The [Federal Trade] Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce or unfair or deceptive acts or practices in commerce.
>
> * * * *

STATEMENT

Petitioners, an Oklahoma partnership, sell automobile motor oil to dealers for public resale under the trade name "Double Eagle".* On October 27, 1955, a Commission complaint challenged Double Eagle's failure to disclose on its oil containers and in its other publicity that the oil is derived substantially from re-

* Petitioners, re-refiners of motor oil, carry on their business in the manner described in the Government's brief opposing certiorari in *Mohawk Refining Corp.* v. *Federal Trade Commission*, No. 84, this Term.

refined used oil (R. 7). After hearing, the Commission's examiner, on April 19, 1957, issued an initial decision ordering petitioners to cease and desist from advertising or selling oil, derived from oil which has been previously used, without disclosing that fact (R. 32-34).

On appeal, the Commission adopted the examiner's decision without material modification (R. 36-41). Finding that consumers of oil are induced to buy Double Eagle brands in the mistaken belief that the product is one refined from virgin crude oil (R. 38), it concluded that, regardless of the quality of petitioners' oil, Double Eagle's failure to disclose the true source of its product constitutes an unfair method of competition and a deceptive practice within Section 5(a) of the Federal Trade Commission Act (R. 39). The Commission rejected the argument that relief would not be in the public interest because disclosure of the used-oil source would destroy the market for re-refined oil and thus waste valuable oil, citing the statement in *Federal Trade Commission* v. *Algoma Lumber Company* (291 U.S. 67, 81) that "conservation * * * is a good of large importance, but the end will have to be attained by methods other than a license to do business unfairly" (R. 40).

The Court of Appeals for the Tenth Circuit (one judge dissenting) affirmed.

ARGUMENT

The instant case raises factual and legal questions substantially the same as those presented in *Mohawk Refining Corp.* v. *Federal Trade Commission*, No. 84, this Term. As set forth in the brief in opposition filed

in that case, the Commission's holding that a failure to disclose the used-oil source of motor oil offered for public sale constitutes a violation of the Federal Trade Commission Act involves no novel question of law warranting review by this Court.

As the court below found, there is substantial evidence in the record to support the conclusions of the examiner (R. 33-34) and the Commission (R. 38) that "a substantial portion of the public who purchase lubricating oil prefer new and unused oil to that produced by the re-refining of crankcase drainings and other previously used oil" (Pet. App. VI). It is well established that misrepresentation can flow from failure to speak as well as from affirmative misstatement. See *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F. 2d 52, 58 (C.A. 4); *L. Heller & Son, Inc.* v. *Federal Trade Commission*, 191 F. 2d 954 (C.A. 7). And it is no defense that the quality of the misrepresented goods may equal that of the product which the public believes it is being offered. See *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67.

Petitioners argue that the motor oil they offer for sale, after completion of the re-refining process, not only equals the quality of oil refined from crude, but actually constitutes "new oil" which is "identical" to the oil produced from virgin crude (Pet. 9). But this is merely a different way of restating the argument rejected by this Court in the *Royal Milling* and *Algoma Lumber* cases, *supra*. If a public preference exists, albeit capriciously, for a product derived from

one source as opposed to another, the deceptive concealment of this source violates the Act even if the end products may be otherwise indistinguishable.

Certainly there is no merit to petitioners' argument (Pet. 18-21) that, public attitudes being what they are, requiring it to disclose the source of its oil may result in discrimination against it in favor of competitors refining their oil from crude oil. There is nothing in the Commission's order which precludes petitioners from making such representations as they please concerning the quality of their product, so long as they also disclose its source. Deceptive concealment is not a permissible substitute for education of the consumer. As the court below pointed out (Pet. App. VIII), the basic theory of Section 5 is that "deception of the purchasing public" is to be prevented regardless of the objectives or the business advantages of such practice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1959

U. S. GOVERNMENT PRINTING OFFICE, 1959 514063 44